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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANE MYRON SCOTT, Defendant and Appellant.	H024429 (Santa Clara County Super. Ct. No. CC102288 & CC122246)

Defendant Dane Myron Scott was charged with six sex crimes against two minor victims, Sandra and Jamie,[1] and one count of falsely imprisoning Sandra. After hearing four days of testimony, a jury convicted defendant of four felonies. The jury found defendant not guilty of falsely imprisoning Sandra (count three - Pen. Code, §§ 236-237)[2] and not guilty of assaulting her with the intent to rape her (count one - § 220). The jury convicted defendant of lewdly touching Sandra, then age 14 (count two - § 288, subd. (c)(1)) and the lesser misdemeanor offense of assault (count one - § 240). The jury convicted defendant of three counts of lewdly touching Jamie, who was under the age of

[1] Due to privacy concerns, the last names of the victims were not used at trial. We will use first names for the same reason with no disrespect intended.

[2] Unspecified section references are to the Penal Code.

14 (counts four, five, and seven - § 288, subd. (a)), and found him not guilty of a fourth charge of lewdly touching Jamie involving sexual intercourse (count six). The jury found true that counts five and seven involved substantial sexual conduct (§ 1203.66, subd. (a)(8)), count five involving digital penetration and count seven involving sexual intercourse. In bifurcated proceedings the jury found true that defendant has four prior convictions, one for possessing stolen property and three for residential burglary, after two of which he served separate prison terms.

Defendant asked the trial court to strike two of his prior burglary strikes. At a hearing on this request, defendant offered expert testimony. After denying defendant's request for expert testimony, the court declined to strike any of defendant's three strikes. Under the "Three Strikes" law, the court sentenced defendant, then age 41, to prison for 100 years to life, with consecutive terms of 25 years to life for each of the four felony convictions. (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2).) This sentence was enhanced by 10 years, five years for each of two serious felony convictions brought and tried separately. (§ 667, subd. (a).) Two one-year enhancements for prior prison terms were imposed (§ 667.5, subd. (b)) and stayed. The court imposed a county jail sentence for the misdemeanor assault in the amount of time already served. The court also imposed a restitution fund fine of $5,000.

On appeal defendant asserts over a dozen errors, including instructional and evidentiary errors. Among the most significant are that the trial court erroneously instructed the jurors that evidence of one charged sexual offense is probative of a defendant's disposition to commit another charged sexual offense and that the trial court declined to hear expert testimony on the motion to strike. The People concede a

sentencing error. For the reasons stated below, we will modify the sentence and affirm the judgment as modified.[3]

TRIAL EVIDENCE

The crimes involving Sandra all occurred on one day in the summer of 2000. The crimes involving Jamie occurred between December 1, 1999 and December 21, 2000. Defendant, born in July 1960, did not testify at trial.

I. *Sandra*

Defendant and Sandra's father, Jose, were coworkers for about a year in a small house repair company. The owner and most of the employees, including defendant, were Jehovah's Witnesses.

Defendant and Sandra's family did not socialize, but defendant visited their residence a few times. Defendant and Jose got pit bull dogs from the same litter.

Defendant stopped working with Jose about a month before the offenses. A few days before the offenses, defendant visited their residence on a motorcycle and asked Jose if he could give one of his daughters a ride. Jose said no.

Sandra, born in May 1986, testified at trial as follows. One afternoon in the summer of 2000,[4] Sandra answered a knock on the door of their residence. It was defendant. She told him that her father was not home. Defendant walked away. She went back to the bathroom to dry her hair after a shower.

After a few minutes Sandra went into the back yard to pick up trash that their two pit bulls, Ken and Barbie, had spilled. Defendant was sitting in the back yard, though she

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[3] By separate order filed today, we will dispose of defendant's habeas petition, which we have considered togther with this appeal.

[4] Sandra believed the day was a week before her father's birthday on July 10, 2000. Her father recalled the day being in late July or early August.

had neither invited him into the back yard nor given him permission to enter it. He talked to her. She did not reply. As she picked up trash, he approached her from behind and grabbed around her chest with both arms. He squeezed her breasts hard with both hands. Defendant rubbed up against her from behind. Her back felt his erect penis through their clothing. This continued for about five minutes. Meanwhile the pit bull Barbie lay in the grass.

Next defendant put his right arm across Sandra's neck and shoulder and pulled her about 40 feet across the back yard to their garage. Sandra was scared and told defendant to let her go. The garage door was broken. A curtain was in its place.

Defendant took Sandra into the garage and sat her on a couch. Defendant held her on the couch with his hand on her shoulder and his arm across her throat. He exerted enough pressure that it was hard for her to breath or scream. As defendant began unbuckling his pants, Sandra summoned Barbie by clicking her tongue. Defendant let Sandra go when Barbie growled.

Sandra ran into her house and locked the door behind her. She woke up her mother, who was sleeping after working a late shift. Sandra told her mother that defendant had tried to embrace her. She did not tell her mother everything. Sandra's mother called her husband Jose at work. She told him to come home as defendant was acting strange and scaring them. Sandra's mother checked to make sure the doors and windows were locked. Defendant walked around the house once trying to open doors and windows. He repeatedly called Sandra's name and told her to come out. Due to tinted windows, defendant could not see inside.

Jose arrived in about 10 minutes. He saw defendant walking down his driveway to the street, where defendant's truck was parked. Jose told defendant that defendant had no reason to be in his back yard. Defendant was upsetting his family. He should not contact them any more. Defendant hung his head during their conversation.

Sandra's parents decided to report defendant to the elders in his congregation of Jehovah's Witnesses. They reasoned that the elders could help defendant and make sure he would not act that way again. The elders serve the function of priests or ministers in other religions. If a complaint is made, the procedure is that at least two elders investigate. If serious wrongdoing is discovered, a judicial committee is appointed.

The same day as the offenses, two elders, James McQueen and Sal Palma, met with Sandra and her parents. Mr. McQueen was also employed at the house repair company where defendant and Jose worked. At trial Sandra was "very sure" she told the elders that defendant had grabbed her breasts. She was "very certain" she told them that defendant had rubbed his penis against her backside. She thought she had told them about the garage. She did not mention that defendant began to unbuckle his pants, because it was embarrassing.

Sandra's mother recalled Sandra telling the elders that defendant had touched her breasts while he grabbed her from behind. If Sandra had mentioned that detail before their talk with the elders, they would have called the police. Jose did not call the police because he had taken care of the problem and made sure defendant would not return.

Mr. McQueen testified for the defense as follows. He and Mr. Palma questioned Sandra to determine if there had been an inappropriate touching of sexual organs, the scriptural crime of pornea. Mr. McQueen asked several times if defendant had touched Sandra's breasts or genitals. Sandra denied it each time. Sandra seemed frightened and reluctant to talk, as though she were holding something back. She appeared to be upset during their meeting. Her posture was closed with her arms folded across her chest. She was very hesitant in answering, even when her father asked her in Spanish. She maintained a physical distance from everyone in the room, including her parents.

Sandra told Mr. McQueen that defendant came to the door and told her to come outside to pick up trash. While they were outside, defendant grabbed her around the

waist. Mr. McQueen had Sandra demonstrate with her father how defendant grabbed her. The dog growled and defendant released her.

Sandra's mother did not want to call the police on a brother in the Johovah's Witnesses. Mr. McQueen encouraged them to call the police if they felt threatened. Mr. McQueen destroyed his notes of their investigation because they decided not to proceed.

Defendant was arrested on February 28, 2001.

The police were notified of defendant's encounter with Sandra in August 2001 by Amy Williams, a licensed marriage and family counselor. Sandra was in counseling with Williams for reasons unrelated to defendant. On August 2, 2001, Sandra first disclosed that a man had touched her inappropriately. Sandra said that she was now safe because the man was incarcerated. Ms. Williams heard enough on August 2, 2001, to know she would need to make a report to child protective services. She told Sandra that she might want to bring her father to their next session.

Jose accompanied Sandra on August 9, 2001. They told Ms. Williams that defendant was in jail for having sex with a minor. Sandra rested her head on her father's shoulder as she told Ms. Williams the following. Sandra went outside to clean up after her dog. Defendant let himself into the backyard, saying he wanted to talk about the dog. Defendant grabbed her from behind and locked his arms around her, touching her breasts. He grabbed one arm and walked her into the garage. He let go of her when the dog growled.

Sandra testified that she was unaware of defendant's involvement in another case until after these sessions with Ms. Williams. She could not remember who told her about it. Sandra did not want to come to court to testify.

II. *Jamie*

Jamie was born in June 1987. Her family are Jehovah's Witnesses and so do not celebrate traditional holidays.

Jamie and her friend Susana met defendant in about December 1999 in a mall in Santa Clara. According to Jamie, Susana patted his pockets and asked for money. According to Susana's testimony, Jamie is the one who did this. They were asking people at the mall for money. Jamie got defendant's cellular telephone number.

Defendant walked in through the front door of Jamie's house a few days later. Jamie testified that she did not call defendant. He must have seen her standing outside her house. He visited for about 20 minutes. For about 10 minutes he touched her chest and pelvic area through her clothing. He left her $20.

At the time Jamie's parents both worked during the day, so she was on her own as far as getting to school. Occasionally Jamie called defendant when she was bored or needed a ride to school. Sometimes he called her.

Defendant visited Jamie five or six more times during the year 2000. Usually she was alone but sometimes Susana was there. Susana saw Jamie give defendant a hug. She did not see defendant touching Jamie's breasts or vagina. Defendant was always looking at Jamie's chest and butt. She told Susana that she felt weird about defendant visiting.

Jamie was flattered by defendant's attention and compliments because he was older and the guys at school did not look at her. She told him she was 12 years old. He said she looked older. When defendant visited her he touched her chest and vaginal area. Usually it was over her clothing, but it was under a couple of times. (Count four.) A couple of times he brought her beer. He left her money, either $20 or $40, after most visits.

According to Susana, Jamie was interested in defendant for his money. Jamie said that she got money from defendant and that she sold defendant some of her mother's prescription medication. Jamie denied doing so and telling Susana that she did so.

Once defendant took Jamie into the bathroom. He unzipped her pants and pulled them down. He put the fingers of one hand in her vagina while he masturbated to climax with the other hand. (Count five.)

Jamie testified that they had sexual intercourse twice. (Counts six and seven.)[5] Once they met at a park. She got into his truck. They drove around and stopped at a secluded spot near a school. At defendant's request she got into the truck's back seat, as did he. He unzipped her pants and told her to pull them down. He removed her underwear. He tied his shirt to a hand strap in the truck to serve as a curtain. Defendant used a condom. Jamie bled a little.

It happened again possibly three or four weeks later. Jamie was not sure of the time. She "suck[s]" at judging time. This time they parked by the Santa Clara Library. Defendant had a condom but did not use it. He ejaculated inside her.

At trial Jamie was "pretty sure" the second occasion occurred in defendant's black truck. She recalled its leather seats.

Jamie told Susana once that defendant had raped her. Susana knew Jamie to be a big liar, but "she wouldn't make a lie that bad."

Defendant had a white Ford pickup truck with fabric seats until October 23, 2000, when he exchanged it at a dealership for a black Ford pickup with leather seats.

On Friday night, January 26, 2001, Jamie's mother caught her with a pregnancy test kit. This precipitated a long discussion. Jamie first said it was for a friend. Then she admitted that she had engaged in sex with a man about her father's age whom she knew only as Scotty.

On Monday, January 29, 2001, Jamie's mother called the police. Santa Clara Police Officer Anthony Layton came to their residence and interviewed Jamie the same day. Jamie said that she had sexual intercourse with defendant in a white pickup truck two weeks earlier and a month before that. Jamie was very reluctant to be interviewed.

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[5] As mentioned above, the jury acquitted defendant of count six and convicted him of count seven.

She did not make eye contact with Officer Layton. She talked to her mother and once left the room during the interview. Jamie was uncertain about exact dates but exhibited no doubt it was a white pickup truck.

On January 31, 2001, Jamie was examined for genital injuries at Valley Medical Center by Mary Ritter, a physician assistant and primary examiner for sexual assault response team (SART). Jamie's mother was present. Jamie reported that she had regular periods, the last being on December 18, 2000. Using a magnifying colposcope, Ms. Ritter observed a V-shape defect in the hymen at the 8 to 9 o'clock position and irregular tissue at 3 o'clock. This was definite evidence of prior penetrating trauma by something that went between Jamie's labia. Ms. Ritter could not say when it occurred. It could have been any time from two weeks to two years earlier. Ms. Ritter had done 200 similar exams after Jamie's and before trial in November 2001.

On February 1, 2001, Santa Clara Police Detective Jerry Rodriguez interviewed Jamie and her mother at length at the police department. Jamie rarely made eye contact with Detective Rodriguez. She spent a lot of time curled up on a couch in an almost fetal position. She answered some questions to her mother. Once she flushed red and left the room. She said that she and defendant last had sex two weeks earlier on the front seat of a white pickup truck. She was aware that defendant had a white truck and a black truck. Jamie also said the truck had a leather interior. Defendant exclaimed, "Holy shit, I came inside you."

The police tracked down the new owners of defendant's white truck and examined the truck on April 10, 2001. They looked for any evidence of sexual activity. A laboratory report of May 21, 2001, revealed no evidence of semen or blood in the white truck. When Detective Rodriguez told Jamie about these results, she said that the intercourse might have occurred up to three months earlier.

The police did not examine defendant's black truck, though it alone had leather seats, because Jamie said they had sex twice in the white truck. Defense experts

examined defendant's black truck after his wife brought it in to them in October 2001. They found no evidence of semen or human blood on the perforated leather seats of the black truck.

Jamie has run away from home more than once. One time she ran away was before the preliminary examination because she did not want to ever see defendant again.

It was stipulated at trial in November 2001 that Jamie was pregnant and defendant was not the father.

III. *The Pretext Telephone Call*

Detective Rodriguez asked Jamie to make a pretext telephone call to defendant. She reluctantly agreed to make the call. The first day, February 1, 2001, they only got defendant's answering machine. They also got defendant's answering machine another day. Finally on February 27, 2001, around 5:00 p.m. Jamie was able to speak to defendant, with Detective Rodriguez monitoring the call and writing Jamie reassuring notes. The pretext was that Jamie was scared that she was pregnant. The call was tape-recorded. The recording was in evidence at trial.

At the beginning of the call, defendant acknowledged that Jamie had left him two messages. "And I didn't answer'em. And I didn't hear from you for like weeks and I go like, I go like, 'Damn! Man' and I was like, I got hard for you a bunch of times and I go like, I was like ready to go over there and leave some money on your window. (Laughs.) I was like when you gonna call me. (Laughs.) I was like oh man, I miss baby. What happened?

"And I said, well you weren't no, you weren't that, that appealing and I go, I must've mess, I'm messed up and I said, 'Oh, I must've bomb, I bombed out right?'"

Jamie had apparently left a message about the cops coming by. He asked her what happened. She said it was a long story. He said she should tell him because he could help her. He thought maybe something bad had happened to her and he could not see her and did not know how to get ahold of her. He thought that she got a boyfriend and was

"doing [her] duty." Jamie said she had a boyfriend. Defendant said, "And then I, and then I thought well she's busy doin' her little boyfriend and she'll give me a call later on." Jamie laughed and denied doing her boyfriend. Defendant said, "you still love me 'cause you called me."

Jamie gave a couple of reasons for being unable to call. Defendant said he was worried about her but thought he would give her some time. He worried that she would not call him again. "And I was like heartbroke and I said, 'No, no. I gotta keep the faith. She's gonna call me. She's gonna call me. She'll call me when she's ready. She'll call me when she's ready. She'll call me when she's ready'. 'Cause you can't deny we got love." Defendant again said he was thinking about going to her window and leaving money.

Jamie asked if she could talk to defendant because she was nervous and sick. He asked what she wanted to talk about. The following discussion ensued.

"V: OK. Um, you know last time . . . ?

"DS: Um-hum. (Yes)

"V: You, you remember what we did, right?

"DS: No. Don't even go there, fool.

"V. OK. Well, um . . .

"DS: Dude, you were already havin' that, you were already havin' that hang up before, before we even talked. So what happened?

"V: (Inaudible) Shit. Um . . ."

Defendant questioned whether anyone else was present with Jamie. She denied it.

"DS: So what, so you're gonna say, I already know what you're gonna say.

"V: What?

"DS: And then you're gonna try to say, dah, dah, dah, about me, right?

"V: Say what?

"DS: Right?

"V: Now, what'd you say?

"DS: You're gonna say duh, duh, duh, about me.

"V: Duh, duh, duh, like what?

"DS: I'm gonna say, 'no, no, no'. So what? Are you?

"V: I think I'm pregnant.

"DS: That's not me, fool!

"V: You were the last one.

"DS: No way! You were, look, you were trippin' on that even before we were talkin'.

"V: No, that was for Tiffany 'cause she thought she was pregnant too. She's not but . . .

"DS: No, you told me you missed your, you missed your, you missed your period for like two weeks.

"V: So."

Jamie explained that her period was late before due to medication but "then I had my cycle and then we did that and then . . .

"DS: So you are?

"V: I don't know! And I'm like, I'm fuckin' trippin' out now because my mom found a pregnancy test in my room and she's keep on, she keeps on asking me stuff about it and I don't know what to tell her.

"DS: Hmm. I got nothing' to do with it. I ain't got nothing to do with it, fool. (Pause, noise in background) So where's everybody at?

"V: My parents are gone right now, they're uh . . . I don't know. Hey, I have a question.

"DS: Hmm.

"V: Why didn't you use a condom last time?

"DS: 'Cause I didn't do nothing."

Throughout the remainder of the conversation, when Jamie repeated that they had intercourse, defendant denied responsibility for impregnating her. He questioned her for turning on him and accusing him when all he had done was try to steer her in the right direction and give her moral support. He said: "That ain't me." "I don't even love you like that, fool. I just look after you. You can't put that off on me."

DELIBERATIONS

The jurors deliberated for slightly over two days before returning their verdicts. During deliberations, the jurors asked several questions. First, they asked for a readback of the testimony by Jamie and her friend Susana. They also asked for a tape-recorder to play the tape of the pretext telephone conversation. The reporter read back Susana's testimony. The jurors sent a second note canceling their request for a readback of Jamie's testimony and asking for further instructions on how to obtain readback of parts of testimony. The judge responded with a note saying the request should be as specific as possible. The following day the jurors sent a note asking for Jamie's testimony about the digital penetration in the bathroom and the incidents in the truck. The reporter provided the readback. The jurors sent another note asking for a readback of Sandra's testimony about her family's pit bull dogs and defendant dragging her to the garage. The reporter provided the readback the following day, after which the jurors returned their verdicts.

When the jury was polled about their verdicts, each juror affirmed that the verdicts were his and hers.

EVIDENCE

I. *Testimony About Sandra's Credibility*

On appeal defendant contends that the trial court erred by allowing two witnesses to offer opinions about Sandra's credibility. This contention arises from the following facts.

At the outset of trial the court granted defendant's motion to exclude certain testimony, stating, "There will be no testimony of any witness with respect to an opinion as to whether or not the victim was telling the truth as to this particular case."

Defendant argues that this order was violated by the testimony of Amy Williams, Sandra's psychotherapist, and James McQueen, an elder in the Jehovah's Witnesses.

The direct examination of Ms. Williams by the prosecutor, Ms. Lohman, included the following.

"Q. Can you describe what her demeanor was like back on August [2d] when she first began telling you that something had happened to her the prior summer?

"Mr. Clancy: I'm going to object as not being a prior consistent statement. There being no inconsistent statement having to do with that.

"The Court: This is preliminary; the circumstances under which the statement, whatever they might be, were [*sic*] made. On that basis, overruled.

"Ms. Lohman: Thank you, Your Honor.

"Q. What was her demeanor like when she first began disclosing to you that something had happened to her the prior summer?

"A. Ambivalent. A little ambivalent to talk about it. Somewhat kind of matter-of-fact, but a little bit flat, which isn't unusual --

"Q. What --

"A. --to disclose that kind of information for a young girl.

"Q. What do you mean by 'ambivalent'?

"A. Not wanting to give me every detail. But which isn't unusual. It's kind of a tough subject to talk about.

"Mr. Clancy: I'm going to object as not being responsive to the question.

"The Court: Overruled.

"Q. (By Ms. Lohman) Can you go ahead and finish your answer?

"A. Oh.

"Q. Unless you had. Maybe you hadn't.

"A. I was just saying that it's just not unusual to have some flat affect, be a little detached from discussing the event. That is kind of reliving an experience. That's very traumatizing."

Direct examination of Mr. McQueen by defendant brought out that Mr. McQueen had Sandra and her father re-enact the way defendant had touched her earlier that day. On cross-examination the prosecutor asked why Mr. McQueen had them re-enact it.

"Q. Why did you ask that question?

"A. It seemed that she wasn't being very open with her comments, and we needed to be a hundred percent certain as to what was going on. And so we were trying to determine what had taken place.

"Q. So you personally had the sense that she was withholding something based --

"Mr. Clancy: Objection. Calls for speculation.

"Ms. Lohman: If you let me finish the question --

"Q. Based on her demeanor, your sense from her demeanor was that she was withholding something?

"Mr. Clancy: Objection. Calls for speculation.

"The Court: Well, it is asking for somewhat speculative testimony, but he is talking to her in the context of an elder in the church trying to obtain information. And he's assessing her demeanor, credibility, and things of that sort. And I'm not going to suggest one way or another, but simply ask the question: Are you in a position to answer based on what you saw, what you observed, the demeanor, the manner in which she responded, et cetera, as to whether she was attempting to withhold something?

"The Witness: It appeared so."

Later the prosecutor asked why Mr. McQueen advised the family to call the police if they felt threatened. "And wasn't that, at least in part, because, although you had not been able to get Sandra to talk openly about the details of what had happened to you --"

Defendant objected that the question contained a conclusion. The prosecutor restated the question, asking whether Mr. McQueen had given this advice, "at least in part because you were left with the impression based on her demeanor that Sandra may not have told you all the details of the incidents?"

"Mr. Clancy: I'm going to object as argumentative, conclusionary and speculative.

"The Court: No, it's the witness's testimony, and he can tell the jury why he did what he did. Go ahead. Overruled."

Mr. McQueen answered that he just wanted to reassure the family that there would be no problem if they called the police.

It appears that defense counsel did not object to any of this testimony as a violation of the court's prior order. (Evid. Code, § 353.) Defendant argues that his counsel was ineffective in failing to do so. Accordingly we reach the merits of defendant's arguments.

For the sake of discussion, we will assume that lay opinion about the veracity of others is still inadmissible after Proposition 8. "With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' (*id.*, § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (*id.*, § 780, subds. (a)-

(k)). Thus, such an opinion has no 'tendency in reason' to disprove the veracity of the statements. (*Id.*, §§ 210, 350.)" (*People v. Melton* (1988) 44 Cal.3d 713, 744.)

We do not understand Mr. McQueen in the quoted passages to have explicitly or implicitly offered an opinion of Sandra's credibility. (*People v. Medina* (1990) 51 Cal.3d 870, 886-887 [officer testified that the defendant was responsive and appeared to understand their conversation].) What he said was that during his interview of Sandra, she was not very open with her comments and appeared to be holding something back. We understand this to be Mr. McQueen's personal observation of Sandra's behavior, demeanor, and body language during their conversation. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1308 [citing cases allowing lay opinions about extent of suffering, rationality, and intoxication based on personal observation].) This statement helped clarify his testimony about why he repeatedly questioned Sandra about whether defendant had touched her breasts or genitals. (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 153 [officer testified that the defendant adopted a combative posture when asked to produce hair and blood samples].) Since Mr. McQueen's testimony did not violate the court's pretrial ruling, defense counsel cannot be faulted for failing to object on this ground. "Counsel is not required to proffer futile objections. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Counsel did object that Mr. McQueen's testimony was speculative. We believe that the questions and answers were appropriately limited to Mr. McQueen's personal observations and impressions of Sandra's demeanor during their interview.

Ms. Williams's testimony was like Mr. McQueen's in saying that Sandra seemed reluctant to discuss her encounter with defendant during their therapy sessions. For the same reasons we conclude this testimony was unobjectionable as a violation of the court order.

Ms. Williams also went further in explaining that it was common to have a flat affect when describing a traumatizing experience. In closing argument, the prosecutor

asserted that Ms. Williams had testified that Sandra's flat demeanor "was very normal for a sexual assault victim."

We do not understand Ms. Williams to have said that she believed Sandra due to Sandra's flat affect. (Cf. *People v. Castro* (1994) 30 Cal.App.4th 390, 395-396, disapproved on another ground by *People v. Martinez* (1995) 11 Cal.4th 434, 452 [psychotherapist may not testify that a witness was telling the truth on particular occasion].) Ms. Williams simply said that Sandra's behavior was consistent with someone who had a traumatizing experience. Such stress syndrome evidence is admissible to disabuse jurors of commonly held misconceptions about how people react to stress and to rehabilitate a witness whose credibility has been attacked for not acting like a victim. (*People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1301-1302 [expert testimony that parents do not immediately report child molestation].)

Since Ms. Williams did not state her opinion of Sandra's credibility, defense counsel need not have objected to a violation of the court's order. Counsel did object that this answer was unresponsive to the question about Sandra's demeanor being "ambivalent." In our view, Ms. Williams was explaining her observation of Sandra's demeanor during their conversation. Just as a layperson with experience in alcohol or drugs may describe another person's intoxication (see *People v. Williams* (1988) 44 Cal.3d 883, 914-915), Ms. Williams's experience as a psychotherapist qualified her to explain how patients acted in discussing "tough subjects." This was not offered as an expert opinion.

Since we conclude that this testimony was admissible, we need not consider whether defendant was prejudiced by its admission.

II. *Jamie's Medical Examination*

Mary Ritter, a physician assistant, testified that she examined Jamie at the hospital with a colposcope for evidence of genital injuries and found two indicators of a prior

penetrating trauma. On appeal defendant contends that his trial counsel should have objected to Ms. Ritter so testifying without first establishing her expertise in this area.

Evidence Code section 720, subdivision (a) states: "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." Absent an objection, a witness may offer an expert opinion without first establishing his or her specialized knowledge.

People v. Catlin (2001) 26 Cal.4th 81 explained: "An expert witness's testimony in the form of an opinion is limited to a subject 'that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' (Evid. Code, § 801, subd. (a).) A claim that expert opinion evidence improperly has been admitted is reviewed on appeal for abuse of discretion. [Citation.] [¶] Qualifications other than a license to practice medicine may serve to qualify a witness to give a medical opinion. [Citations.]" (*People v. Catlin, supra,* 26 Cal.4th at pp. 131-132.)

Defendant's premise is that Ms. Ritter would have been unable to qualify as an expert if his trial attorney had objected. This assumption is refuted by the record. Ms. Ritter examined Sandra in the dual capacity of a hospital employee who also served as a member of the sexual assault response team. Ms. Ritter performed 200 examinations after Sandra's and before trial. There is no reason to believe that Ms. Ritter had not performed many examinations before Sandra's. (*People v. Hart* (1999) 20 Cal.4th 546, 630 ["there is no indication in the record that he did not have expertise with regard to the matters to which he testified"].) Given Ms. Ritter's apparent qualifications, "counsel may well have thought there was little to be gained in parading this expertise before the jury." (*People v. Padilla* (1995) 11 Cal.4th 891, 953, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Since it appears that Ritter was

qualified to render the opinion she offered, we conclude that it was not incompetent for defense counsel to fail to object to her expertise.

III. Defendant's Entry Into Sandra's Yard

On appeal defendant contends that the trial court erred by excluding evidence that he had Sandra's implicit permission to enter her back yard. This contention arises from the following facts.

In cross-examination of Sandra, defendant asked whether, when he spoke to Sandra at her door, defendant had told her that he was bringing some toys to their dogs. The court sustained the prosecutor's hearsay objection, despite defendant asserting that it was an operative fact. Later, in the jury's absence, defendant offered to prove that he had made this statement, and Sandra had responded, "'they are in the back,'" which amounted to implied permission for him to enter the back yard. Defendant contended that this was an inconsistent statement. The court ruled that it was still hearsay.

During examination of the Elder McQueen, defendant established that Sandra talked to defendant about the dogs being in the back. The prosecutor successfully objected to Mr. McQueen explaining what defendant said to Sandra. Defendant again argued that it was an operative fact. The court allowed defendant to establish through Mr. McQueen, the elder, that after defendant said something to Sandra, she said, "Go ahead," they were in the back.

We need not elaborate on the operative fact doctrine. (See, e.g., *People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069.) If we assume that the trial court erred in excluding evidence of defendant's statement, we cannot see how defendant was prejudiced. Defendant contends this was "crucial defense evidence impeaching [her] testimony." We regard it as impeachment on a collateral issue. We do not understand defendant to suggest that he was justified in assaulting or touching Sandra if she permitted him to enter the back yard.

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . , and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 . . .)." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

This ruling did not deprive defendant of the opportunity to impeach Sandra. At trial defendant had ample impeaching evidence. There were differences between Sandra's and Ms. Williams's versions of their conversations. There were differences between Sandra's and Mr. McQueen's versions of their conversation. Sandra told inconsistent stories about how defendant grabbed her and what happened between them. The jury had parts of Sandra's testimony read back during deliberations. Defendant recognizes that the jury rejected "substantial portions of her testimony." Defendant was acquitted of the charges of false imprisonment and of assaulting her with intent to rape and convicted only of lewd touching and a misdemeanor assault.

Sandra's consent to defendant entering her back yard would be a critical issue if defendant had been charged with trespassing. But it was collateral to the charged crimes of lewd touching, assault, and false imprisonment. Since defendant was able to effectively produce evidence impeaching Sandra's version of the charged offenses, we conclude that it is not reasonably probable that defendant would have obtained a more

favorable verdict had he been able to introduce better evidence on the topic of her consenting to his entry into the back yard.

PROSECUTOR'S ARGUMENT

On appeal defendant contends that the prosecutor committed misconduct in the following closing argument.

The prosecutor asserted that both Sandra and Jamie were reluctant to discuss the events with others and to testify. "If you want to know why sexual offenses go unreported, it's because girls have to come in and talk about this publicly, and be grilled by defense attorneys who point out that when a girl says and demonstrates this kind of a hold (indicating), that when she one time describes it as grabbing her shoulder and one time describes it as grabbing her throat, that somehow she's now lying, they get victimized all over again."

As there was no objection, defendant argues alternatively that the misconduct was so egregious as to be incurable and that his counsel was ineffective in failing to object.

People v. Prieto (2003) 30 Cal.4th 226 explained at page 260: "'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 . . . .) '"Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'"' (*People v. Ochoa* (1998) 19 Cal.4th 353, 427 . . . .) Finally, 'when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]"

Defendant contends that this statement by the prosecutor was designed to inflame the jury against defense counsel based on facts that were not in evidence.

We reject this characterization. Most of the prosecutor's comments alluded to topics that the jury observed. There was evidence that Jamie and Sandra were reluctant to testify. There was evidence that Sandra had described in different ways how defendant had grabbed her. In arguing about these topics to the jury, defense counsel suggested that the emotion of these witnesses in being withdrawn and embarrassed to testify indicated that they were lying. Counsel also stated that Sandra had "changed her story" about how defendant had grabbed her. The prosecutor responded to this argument with a fair comment on the witnesses' behavior that they were reluctant to testify and be subject to cross-examination. (*People v. Padilla, supra,* 11 Cal.4th at p. 944.) Regarding the prosecutor's characterization of the cross-examination as victimizing the victims, the jury was able to draw its own conclusions. We do not regard this as a personal attack on the integrity of defense counsel. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1166-1167 [okay for prosecutor to mention defense counsel's " 'tricks' " and " 'moves' "].)

The prosecutor offered these remarks to explain her premise "[i]f you want to know why sexual offenses go unreported . . . ." There was no trial evidence in support of this premise, and the court might have so advised the jury had defense counsel objected. Since a prompt admonition would have remedied this error, we conclude that the failure to object waives this claim on appeal. (*People v. Prieto, supra,* 30 Cal.4th at pp. 259-260.)

After argument was concluded, the trial court did instruct the jury that "statements made by the attorneys during the trial are not evidence" (CALJIC No. 1.02) and that the jury must determine what facts have been proved from the trial evidence and no other source (CALJIC No. 1.00).

We do not understand how this irrelevant assertion by the prosecutor could have influenced the jury's deliberations and it does not appear to have done so. In deliberating over two days, the jurors asked to review parts of the testimony of both victims. The jurors ultimately acquitted defendant of one of the charges of intercourse to which Jamie

testified and the false imprisonment to which Sandra testified. It appears that the jurors closely considered the victims' testimony. We conclude that it is unlikely defendant would have obtained a better result had his trial counsel objected to the prosecutor's brief assertion of unreported sexual offenses.

INSTRUCTIONS

I. *Jury Reporting Instruction*

Defendant contends that the trial court committed reversible error when it instructed the jurors in terms of CALJIC No. 17.41.1 that each was obliged to report any misconduct by another juror during deliberations. The prosecutor also read this instruction to the jury in opening argument.

In *People v. Engelman* (2002) 28 Cal.4th 436, the California Supreme Court concluded "that the giving of the instruction did not constitute constitutional error" (*id.* at p. 444), though the court determined in an exercise of its supervisory power that CALJIC No. 17.41.1 should not be given in future trials due to its potential for interfering with jury deliberations (*id.* at p. 449).

Defendant recognizes that we are bound by *Engelman*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He simply states his arguments to preserve them for possible federal review. We observe that there was no suggestion of juror misconduct or coercion while the jurors sent several notes during deliberations and were polled about their verdicts.

II. *Disposition Instruction*

On appeal defendant contends that the trial court erred in instructing the jury that it could consider evidence of one charged sexual offense to prove defendant's disposition to commit another charged sexual offense.

The court instructed the jury as follows. "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions. [¶] 'Sexual offense' means a crime under the laws of the State of California

that involve the following: [¶] Any conduct made criminal by Penal Code section 220, 288(a) or 288(c). The elements of these crimes are set forth elsewhere in these instructions. And I will instruct you on them in just a few moments.

"If you find that the defendant committed a sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the other crimes of which he is accused. [¶] However, if you find beyond a reasonable doubt that the defendant committed a sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the other charged crimes. The weight and significance of the evidence, if any, are for you to decide."

The prosecutor mentioned this instruction in opening argument, asserting that if the jury found any charged sexual offense beyond a reasonable doubt, the jury could infer from that finding that defendant had the disposition to commit the other charged sexual offenses and was more likely to have committed them.

We note that the jury was also instructed that each count charged a distinct crime which the jury had to decide separately. (CALJIC No. 17.02.)

Defendant contends that this disposition instruction is reviewable on appeal despite the lack of objection in the trial court because it affected his substantial rights. (§ 1259; *People v. Prieto*, *supra*, 30 Cal.4th at p. 247.) Defendant alternatively contends that if an objection was required, his trial counsel was ineffective.

Defendant ascribes multiple faults to this instruction. One is that a disposition to commit sexual offenses could not be inferred from a violation of section 220 at the time of trial in December 2001. This inference was not statutorily authorized until Evidence Code section 1108 (section 1108) was amended in January 2003 to include a reference to section 220.

Section 1108 provides in part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101,[6] if the evidence is not inadmissible pursuant to Section 352."

In December 2001, subdivision (d)(1) of section 1108 did not expressly include a violation of section 220 as a sexual offense.[7] Effective in 2003, the following subsection has been added to subdivision (d)(1) of section 1108: "(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem." (Stats. 2002, ch. 194, § 1, p. 683; Stats. 2002, ch. 828, § 1, p. 4108.)

The Second District Court of Appeal, Division 6, has considered whether this statutory amendment was needed to make a violation of section 220 a sexual offense. In

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[6] Evidence Code section 1101 provides in part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

[7] The statute provided in section (d)(1): "'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following:

"(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code.

"(B) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

"(C) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

"(D) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

"(E) An attempt or conspiracy to engage in conduct described in this paragraph." (Stats. 2001, ch. 517, § 1, pp. 3481-3482.)

People v. Pierce (2002) 104 Cal.App.4th 893 (*Pierce*), that court concluded "that the amendment only clarified the preexisting statute by explicitly including offenses that previously fell within section 1108." (*Id.* at p. 899.) The court reasoned that the Legislature's assumption that it was expanding the scope of a statute is not controlling. (*Id.* at p. 899.) Prior to this amendment, section 1108 already included attempted rape, by correlating former subdivisions (d)(1)(A) and (E) (now (F)). Assault with intent to rape is an aggravated form of attempted rape. (*Id.* at p. 898.)

We agree with the reasoning and conclusion of *Pierce* that assault with intent to rape was implicitly included as a section 1108 sexual offense before it was explicitly included. Accordingly, the court did not err by including section 220 in the instruction.

Defendant's main argument is that this disposition instruction was erroneous because "section 1108 cannot reasonably be construed as authorizing the use of evidence of charged offenses as evidence of propensity or disposition." Defendant's argument is based on both the text of section 1108 and its legislative history.[8] The People argue alternatively that section 1108 does not apply to evidence of charged offenses and that the evidence was cross-admissible.

We find no ambiguity in section 1108 requiring us to resort to its legislative history. As we have stated before, "If the language is clear and unambiguous, there is no need for construction. [Citations.]" (*People v. De Porceri* (2003) 106 Cal.App.4th 60, 70.) The statute describes when evidence of "another" sexual offense is admissible to prove a charged sexual offense. In other words, disposition to commit the charged offense may be proved by the commission of any other sexual offense. Although the legislative history cited by defendant talks about "uncharged sexual acts" and "uncharged

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[8] On May 8, 2003, this court granted defendant's request to take judicial notice of parts of the legislative history of section 1108.

misconduct," the statute does not limit itself to "uncharged" sexual offenses. Section 1108 incorporates Evidence Code section 1101 by reference, but that statute also does not limit itself to the use of "uncharged" offenses.

It is likely that most published opinions discuss the relevance of uncharged offenses under Evidence Code sections 1101 and 1108 because, as defendant recognizes, evidence of a charged offense is always admissible to prove the defendant's commission of that offense. (Cf. *People v. Jackson* (1975) 45 Cal.App.3d 67, 70.) But the relevance of a charged offense is not necessarily limited to that offense. It is well-established that evidence of a charged offense may be cross-admissible to prove another charged offense. (*People v. Catlin, supra,* 26 Cal.4th at p. 153 ["the jury properly could consider other-crimes evidence in connection with each count, and also could consider evidence relevant to one of the charged counts as it considered the other charged count"].) Indeed, the cross-admissibility of evidence is a factor courts consider when asked to sever charges. (E.g., *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448; *People v. Ochoa* (1998) 19 Cal.4th 353, 409-410.) When charged offenses are cross-admissible, the courts have no sua sponte duty to give a limiting instruction. (*People v. Jackson*, *supra*, 45 Cal.App.3d at p. 70; *People v. Hawkins* (1995) 10 Cal.4th 920, 942, overruled on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, 110; *People v. Maury* (2003) 30 Cal.4th 342, 394.)

In the absence of this disposition instruction, the jury would have had little guidance in assessing the relevance of a charged sexual offense to another charged sexual offense. The instruction at issue here was a cautionary, limiting instruction based on CALJIC No. 2.50.01. The given instruction omitted stating that an uncharged sexual offense could be established by a preponderance of the evidence because there was no evidence of uncharged sexual offenses. We regard the instruction as favorable to defendant, since it informed the jurors that even if they found beyond a reasonable doubt that defendant committed one sexual offense, that would not be enough to convict him of

another charged sexual offense. Indeed the jury convicted defendant of some charged sexual offenses and acquitted him of one. We conclude that the trial court did not err in giving this instruction. In light of this conclusion we need not consider whether defendant was prejudiced by this instruction.

Defendant also contends that the prosecutor failed to comply with the notice provisions of section 1108, namely "(b) In an action in which evidence is to be offered under this section, the [P]eople shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code." To the extent that defendant is suggesting a discovery violation by the prosecution, we regard this claim as waived by defendant's failure to make this objection in the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 949.) In any event, we seriously doubt that defendant was not on notice of the evidence of the charged offenses.

Defendant also contends that the trial court failed to analyze whether the evidence of the other sexual offenses should have been excluded under Evidence Code section 352. This contention is waived by defendant's failure to make this objection in the trial court. (Evid. Code, § 353, subd. (a).) In any event, the prosecutor was entitled to produce evidence of the charges offenses.

Defendant relies on *People v. Armstead* (2002) 102 Cal.App.4th 784 (*Armstead*) as demonstrating a defect in the disposition instruction. In that case the defendant was charged with nine robberies. During several days of deliberations the jurors asked whether they had to consider the evidence of each count separately or whether they could consider all the evidence together. Over the defendant's objections, the court instructed the jurors that the other crimes may be considered to established identity, motive, and intent. (*Id.* at pp. 790-792.) The appellate court concluded that this instruction denied the defendant due process, because the evidence "was not offered or received during the

trial as 'other crimes' evidence" and this deprived the defendant of a "fair opportunity to argue the weight of 'other crimes' evidence to the jury." (*Id.* at p. 794.)

We consider *Armstead* to be distinguishable because in this case the instructions were settled before counsel presented argument. Defendant was not deprived of due process because he was afforded the opportunity to address the disposition instruction in argument as the prosecutor did.

Defendant contends section 1108 violates due process. That claim has been rejected by the California Supreme Court. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907.) We are bound by the *Falsetta* ruling to reject defendant's due process challenge. Defendant concedes he has presented this argument to preserve the issue for further possible federal review.

Defendant also contends section 1108 runs afoul of the equal protection clauses of the United States and California Constitutions. Adopting the analysis in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185, we reject defendant's equal protection challenge to section 1108. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395.)

EXPERT TESTIMONY DURING MOTION TO STRIKE

On appeal defendant contends that the trial court erred by declining to take expert testimony at the hearing on defendant's motion to strike his prior strikes. This contention arises from the following facts.

After trial defendant filed a motion pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) asking the trial court to strike two of his three prior residential burglary strikes. This motion was supported by a 19-page, single-spaced, typed letter from Brian Abbott, Ph.D., a licensed clinical social worker. The letter provided a forensic evaluation of defendant based on an interview and several psychological tests. Dr. Abbott concluded among other things that defendant exhibited traits more consistent with an impulsive rapist than an entitlement rapist or a sadistic rapist.

At the hearing on April 18, 2002, the trial judge stated that he was in receipt of Dr. Abbott's report. Defendant counsel stated, "Doctor Abbott is present in court, and we would like to call him as a witness at this time." The court responded: "No, you can't do that. I've read the report. This is not an evidentiary hearing. This is not a formal probation hearing. This is a *Romero* motion. I have six or seven other matters on the calendar. [¶] . . . [¶] . . . We can't do that. I've read the report."

After noting Dr. Abbott's availability to testify, defense counsel stated that his argument was spelled out in the moving papers. The prosecutor asserted that she had just been able to review Dr. Abbott's report that morning. She quoted three passages from the report and argued that the report's conclusions were inconsistent with them.

In *Romero*, the California Supreme Court described the trial court's limited authority under section 1385 to strike a prior serious or violent felony conviction for purposes of sentencing under the Three Strikes statutes. (*Romero, supra,* 13 Cal.4th at pp. 530-531.) The court further delineated the parameters of the trial court's discretion in *People v. Williams* (1998) 17 Cal.4th 148. Trial courts should consider not only the nature and circumstances of the defendant's present and past crimes, but "the particulars of his background, character, and prospects. [Citation.]" (*Id.* at p. 161.)

Rockwell v. Superior Court (1976) 18 Cal.3d 420 (*Rockwell*) considered whether section 1385 authorized the striking of special circumstances in a death penalty case. In the course of that analysis, the court stated: "Although section 1385 provides that a dismissal 'in furtherance of justice' may be ordered either on the motion of the district attorney, or on the court's motion, a defendant may invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice. (*In re Cortez* (1971) 6 Cal.3d 78 . . . , *People v. Tenorio* (1970) 3 Cal.3d 89 . . . .)" (*Id.* at pp. 441-442.)

Rockwell and the cases it cited did not elaborate further on a defendant's right to present evidence in support of a request to strike an allegation of a prior conviction. Defendant cites no case recognizing a criminal defendant's right to present expert testimony at a hearing on a motion to strike a prior strike.

The United State Supreme Court had generally recognized that a defendant has a right to reasonable notice and an opportunity to be heard relative to recidivist charges. (*Oyler v. Boles* (1962) 368 U.S. 448, 452.) However, a defendant has no constitutional right at sentencing to cross-examine adverse witnesses, such as the probation officer. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 755 (*Arbuckle*).) "In *Williams v. New York* (1949) 337 U.S. 241, 251 . . . , the United States Supreme Court concluded that the federal due process clause does not extend the same evidentiary protections at sentencing proceedings as exist at the trial. A sentencing judge 'may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.' (*Williams v. Oklahoma* (1958) 358 U.S. 576, 584.)" (*Id.* at p. 754.) Recognizing a right of cross-examination would make sentencing proceedings too cumbersome. (*Id.* at p. 755.) "Absent a contrary legislative command, it should be within the sound discretion of the trial court to determine those instances when in-court testimony is required to provide a fundamentally fair proceeding." (*Id.* at pp. 755-756.)

For the same reasons given in *Arbuckle*, we conclude that a defendant has no constitutional or statutory right to present live testimony at a *Romero* hearing. The trial court has discretion to take testimony at such a hearing. (Cf. *People v. Borousk* (1972) 24 Cal.App.3d 147, 158.)

Defendant also contends that the trial court abused its discretion. "The trial court's refusal to hear from Dr. Abbott precluded [defendant] from fully setting forth 'the particulars of his backgrounds, character, and prospects.'" Defendant contends that

Dr. Abbott might have been able to explain those statements from his report that the prosecutor questioned. The trial court had already reviewed Dr. Abbott's 19-page single-spaced letter. The trial court might well have determined that the letter contained a sufficient exposition of Dr. Abbott's views. We conclude that the trial court did not abuse its discretion in declining to hear testimony from Dr. Abbott in support of defendant's request to strike two of his strikes.

SENTENCING

I. *Prior Prison Term Enhancements*

On appeal defendant contends that the trial court erred in imposing and staying two one-year enhancements for serving prior prison terms under section 667.5, subdivision (b) for the same two robbery convictions on which the trial court imposed two five-year serious felony enhancements under section 667, subdivision (a). The People concede that the one-year enhancements should be stricken under *People v. Jones* (1993) 5 Cal.4th 1142.

II. *The Assault Conviction*

On appeal defendant contends that he cannot be separately convicted or punished for assaulting Sandra since the assault (count 1) was part of the crime of lewdly touching her (count 2). This contention is based on the prosecutor's argument to the jury.

The prosecutor argued that the lewd touching consisted of the following. "He touched her on the breasts. And she testified that as he grabbed her from behind, he rubbed himself up against her bottom or the small of her back, and she felt his erect penis." The prosecutor argued that the assault consisted of the following. "[N]ot only did the defendant go to grab Sandra, . . . [h]e did grab her. He grabbed her from behind, by the breasts, he grabbed her around the neck and dragged her, walking backwards into the garage, and then he held her down . . . ."

The jury acquitted defendant of falsely imprisoning Sandra and assaulting her with the intent to rape. The jury convicted defendant of lewd touching and misdemeanor assault.

People v. Lopez (1998) 19 Cal.4th 282 has explained: "To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when ' "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*Id.* at pp. 288-289.)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) *People v. Flummerfelt* (1957) 153 Cal.App.2d 104 stated at page 106: "As used in the statute, 'violent injury' includes any wrongful act committed by means of physical force against the person of another. The kind of physical force used is immaterial. (*People v. Bradbury*, 151 Cal. 675, 676; *People v. McCoy*, 25 Cal.2d 177, 191.) The terms 'violence' and 'force' are synonymous when used in relation to assault, and include any application of force even though it entails no pain or bodily harm and leaves no mark. [Citation.]" The jury was instructed that assault involves the likely application of physical force to another person. (CALJIC No. 9.00.)

"[S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child."

(*People v. Martinez* (1995) 11 Cal.4th 434, 452.) The jury was so instructed. (CALJIC No. 10.41.)

Comparing the elements of these offenses reveals that assault is not necessarily included in lewd touching. Assault involves an element of force that simple lewd touching does not.

Defendant does not contend that the accusatory pleading in this case described the lewd touching as including the assault. Instead he relies on the prosecutor's argument. But the prosecutor's argument cited different facts in describing the two offenses. The lewd touching involved defendant grabbing Sandra's breasts and rubbing his erection against Sandra. The assault did not. The assault involved grabbing her and dragging her into the garage. After applying both the elements and accusatory pleading tests, we conclude that the assault was not necessarily included in the lewd touching. Thus the rule precluding convictions of both greater and lesser offenses is inapplicable.

Defendant further contends that the assault conviction arose from the same intent and objective as the lewd touching, so separate punishment is precluded by section 654.

People v. Scott (1994) 9 Cal.4th 331 considered a related topic. The court concluded that multiple section 288 convictions can arise during a single encounter. "Each individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation. [Citation.]" (*Id.* at pp. 346-347.) "'[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed. [Citation.]" (*Id.* at p. 344, fn. 6.)

It is generally a factual question whether a defendant committed two crimes with the same intent and objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) The prosecutor argued that defendant first grabbed Sandra's breasts and rubbed against her and next assaulted her by dragging her off to the garage. The People adopt a different

theory, asserting that the assault consisted of defendant grabbing Sandra and the lewd touching consisted of rubbing against her.

We conclude that there was substantial evidence supporting the implied finding that the assault involved conduct, namely dragging Sandra towards the garage, and a mental state divisible from the lewd touching. There was no error in imposing a separate punishment for the assault.

III. *Consecutive Sentencing*

By second supplemental opening brief defendant contends that the trial court's imposition of four consecutive sentences of 25 years to life violated his right under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] to have his sentence based only on facts found by the jury.

The sentencing judge did not explain his imposition of consecutive sentences. The probation report recommended consecutive sentences because "each count is either a different victim or different separate incident with the same victim." Although defendant asked the court to strike his strike priors, defendant did not object to the consecutive sentences.

A. United States Supreme Court Precedent

The idea that the punishment imposed by the trial court should fit the crime found by the jury has been repeatedly argued. One aspect of this principle was accepted by the United States in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), with the court holding, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) This principle derives from two constitutional rights, the right to trial by jury and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477.)

At issue in *Apprendi* was an enhancement under New Jersey law that could potentially double the maximum sentence for firearm possession from 10 to 20 years if a

trial judge found a hate crime by the preponderance of the evidence. (*Apprendi, supra,* 530 U.S. at pp. 468-469.) The defendant admitted two counts of firearm possession and another offense under a plea bargain that his maximum sentence could be 20 years for two counts of firearm possession unless the court found a hate crime, in which case the maximum would be 30 years. (*Id.* at p. 470.) The defendant reserved the right to challenge the constitutionality of the enhancement statute. After an evidentiary hearing on the enhancement, the court imposed an enhanced term of 12 years on one possession count with concurrent terms on the remaining counts. (*Id.* at p. 471.)

The United States Supreme Court explained that historically judges had little discretion to determine a sentence after a jury verdict, although there was some discretion "in imposing sentence *within statutory limits* in the individual case." (*Apprendi, supra,* 530 U.S. at p. 481.) Constitutional concerns arise when a statute allows the judge to find "a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would received if punished according to the facts reflected in the jury verdict alone." (*Id.* at p. 483, fn. omitted.) The court had characterized this kind of fact as a " 'sentencing factor' " in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86. (*Apprendi*, *supra*, 530 U.S. at p. 485.) *Apprendi* concluded that the New Jersey statute "is an unacceptable departure from the jury tradition . . . ." (*Id.* at p. 497.)

The holding of *Apprendi* was applied recently in *Blakely*. In that case the defendant pleaded guilty to second-degree kidnapping involving a firearm and domestic violence. (*Blakely v. Washington*, *supra*, 542 U.S. at p. ___, 124 S.Ct. 2531, 2534-2535.) The maximum sentence under Washington law for second-degree kidnapping was 10 years, but under other statutory provisions a sentencing judge could only impose 49 to 53 months, unless the judge found an exceptional aggravating factor. The court imposed a sentence of 90 months, finding deliberate cruelty after a three-day evidentiary hearing. (*Id.* at p. ___, 124 S. Ct. 2531, 2535-2536.) The defendant objected that this violated his right to a jury trial.

The real issue in *Blakely* was what was the statutory maximum penalty for *Apprendi* purposes. The court concluded "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra,* 542 U.S. at p. ___, 124 S.Ct. 2531, 2537.) Since the judge had relied on a fact not found by the jury or admitted by the defendant, the sentence in *Blakely* was invalid. (*Id.* at p. ___, 124 S. Ct. 2531, 2538.)

B. Consecutive sentencing

The first step in applying *Blakely* to the sentencing in our case is to determine what is the "prescribed statutory maximum" sentence. (*Apprendi*, *supra*, 530 U.S. at p. 490.) This is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington*, *supra*, 542 U.S. at p. ___, 124 S.Ct. 2531, 2537, italics omitted.) We note that neither *Apprendi* nor *Blakely* indicates what the statutory maximum is for two or more offenses. Indeed, *Apprendi* stated that the possibility of that defendant receiving consecutive sentences was irrelevant to determining whether the enhanced sentence on one count was constitutional. (*Apprendi*, *supra*, 530 U.S. at p. 474.)

Under California's determinate sentencing law, the usual consecutive sentence is one-third of the middle term for the second offense (§ 1170.1, subd. (a)) and it is optional with the court whether to impose a consecutive or a concurrent term (§ 669). However, under the Three Strikes statutes, consecutive sentencing is mandatory "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts . . . ." (§§ 667, subd. (c)(6) & (7), 1170.12, subd. (a)(6) & (7); *People v. Casper* (2004) 33 Cal.4th 38, 42; *People v. Lawrence* (2000) 24 Cal.4th 219, 233; *People v. Hendrix* (1997) 16 Cal.4th 508, 513.)

The sentencing court has discretion to impose a concurrent term under the Three Strikes statutes only if the court finds the current crimes were committed on the same occasion and arose from the same set of operative facts. (*People v. Lawrence*, *supra*, 24 Cal.4th at p. 233; *People v. Deloza* (1998) 18 Cal.4th 585, 599; *People v. Hendrix*, *supra*, 16 Cal.4th at pp. 512-513.)

For second strikes, the Three Strikes statutes require doubling determinate terms. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) This includes doubling one-third the midterm for consecutive determinate sentences when consecutive sentencing is appropriate. (*People v. Nguyen* (1999) 21 Cal.4th 197.) For third strikes, the sentence is an indeterminate life term with a minimum term is 25 years. (§§ 667, subd. (e)(2); 1170.12, subd. (c)(2).) The consecutive sentence limitation of one-third the midterm does not apply to indeterminate sentences. Full consecutive sentences follow indeterminate sentences. (Cf. *People v. Felix* (2000) 22 Cal.4th 651, 657-659 [full term enhancements]; *People v. Reyes* (1989) 212 Cal.App.3d 852, 856 [full determinate term].)

Under *Blakely*, we must ask what is the maximum penalty that a court may impose when a jury finds a defendant to have committed his or her third and fourth strikes. The answer is two fully consecutive terms of 25 years to life. When a defendant, as here, commits strikes four, five, six, and seven, the statutory maximum for *Blakely* purposes is four consecutive life terms. Since the court here imposed consecutive sentences no greater than this statutory maximum, we conclude there was no violation of *Apprendi* or *Blakely*. (*People v. Jaffe* (Oct. 13, 2004, H026265) ___ Cal.App.4th ___ [pp. 35-37]; *People v. Sykes* (2004) 120 Cal.App.4th 1331; *People v. Vonner* (2004) 121 Cal.App.4th 801; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1231-1232; *U. S. v. White* (2nd Cir. 2001) 240 F.3d 127, 135; *U. S. v. Diaz* (8th Cir. 2002) 296 F.3d 680, 684; *U. S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254.)

In light of this conclusion, we need not consider the People's contention that defendant has forfeited this argument by failing to object at sentencing.

DENIAL OF A TRIAL TRANSCRIPT

On appeal defendant contends that the trial court erred by denying his request for a continuance so that new counsel could obtain trial transcripts in preparation for filing a motion for new trial. This argument arises from the following facts.

The jury returned its verdicts on December 7, 2001. Defendant waived time for sentencing. Sentencing was scheduled for February 2, 2002. Defendant substituted attorneys on December 21, 2001, in a document filed January 15, 2002. On February 5, 2002, new counsel filed a motion asking for a continuance of sentencing so that they could file a new trial motion. Counsel asked for a court order to prepare the trial transcripts so that counsel could review them in preparing a new trial motion. Counsel declared in part, "Our office is conducting some additional investigation . . . which had not been completed, which may lead to other evidence favorable to the defense which was not discovered or investigated by [defendant's] trial counsel." Counsel also suggested there was evidence that the tape-recording of the pretext telephone call had been altered.

At a hearing on February 7, 2002, new counsel stated that the court reporter had explained that, due to matters with statutory priority, "it would be three to four months at the earliest before she'd be able to complete the trial transcripts in this matter." The court stated that the matter had been discussed in chambers. The reporter was busy with preparing transcripts on appeal and she was in court most of the day. In several weeks the court was starting a case that would require daily transcripts. "So her estimate of three or four months is a reasonable estimate. And the court feels, taking into account the efficient administration of justice, that the court cannot continue a matter four months to prepare a transcript of the trial for the reason that it might reveal a possible ground for a new trial." The court observed that transcripts would be prepared in the course of an

appeal. "But we can't do it here by way of a possibility of making a motion for a new trial and delaying this case for that period of time for that possibility." It was possible that the reporter could prepare a partial transcript if counsel found a ground for making a new trial motion.

The court did continue sentencing until March 28, 2002, so that defendant could make a motion to strike his prior strikes. New counsel neither requested a partial transcript nor filed a motion for new trial.

People v. Lopez (1969) 1 Cal.App.3d 78 (*Lopez*) considered whether the trial court should have granted an indigent defendant's request for a full trial transcript to prepare for a new trial motion. The court concluded, "We find nothing in the United States Constitution to absolutely require a trial court to interrupt its regular work schedule on each occasion that a motion for a new trial is made in order to give the court reporter time to prepare a full trial transcript within the time limit prescribed by the statute for argument on the motion." (*Id.* at pp. 82-83.) "We hold that an indigent defendant is not entitled, as a matter of absolute right, to a full reporter's transcript of his trial proceedings for his lawyer's use in connection with a motion for a new trial; but, since a motion for a new trial is an integral part of the trial itself, a full reporter's transcript must be furnished to all defendants, rich or poor, whenever necessary for effective representation by counsel at that important stage of the proceeding. And, because there are no mechanical tests for deciding when the denial of a full reporter's transcript for argument on a motion for a new trial is so arbitrary as to violate due process or to constitute a denial of effective representation, each case must be considered on its own peculiar facts and circumstances." (*Id.* at p. 83.)

Lopez concluded that the court did not abuse its discretion in denying the defendant's request when there was no showing that the trial attorney was unavailable to consult with new counsel and no suggestion that new counsel intended to assert trial counsel's ineffectiveness. (*People v. Lopez, supra,* 1 Cal.App.3d at pp. 83-84.) *People v.*

Westbrook (1976) 57 Cal.App.3d 260, disapproved on another ground by *People v. Amin* (1978) 88 Cal.App.3d 637, 640, recognized that trial counsel could not be expected to assist a new trial motion alleging counsel's incompetence. (*Id.* at pp. 263-264.) The court upheld the denial of a free transcript on the basis that the defendant had made "no showing of economic inability to pay for a transcript." (*Id.* at p. 264.)

We conclude that there was neither error nor prejudice in the denial of defendant's request for a transcript. New counsel's speculative showing did not warrant a three- to four-month postponement of sentencing. On appeal defendant has had the benefit of a complete reporter's transcript. Defendant's appellate inability to establish the need for a new trial strongly suggests that he would have fared no better had he been in possession of the 821-page trial transcript in the trial court. In so saying, we recognize that the trial court has more discretion in some areas to grant a new trial than an appellate court. (*People v. Westbrook*, *supra*, 57 Cal.App.3d at p. 263; *People v. Lopez*, *supra*, 1 Cal.App.3d at p. 83.)

CUMULATIVE PREJUDICE

Defendant finally contends that even if no one trial error was prejudicial, they had a prejudicial cumulative effect.

In some cases, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill, supra,* 17 Cal.4th at pp. 844-845, and cases there cited.) Above we have assumed that the jury should have heard more about defendant obtaining permission to enter Sandra's backyard and that the prosecutor should not have suggested in argument that that sex crimes go unreported. A sentencing error has been conceded.

We do not see how these arguable independent errors had a cumulative effect. Their whole did not outweigh the sum of their parts. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) While the trial may not have been perfect, it was fair. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Boyette* (2002) 29 Cal.4th 381, 468.)

DISPOSITION

The sentence is modified to strike the enhancements under section 667.5, subdivision (b). The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections. As so modified, the judgment is affirmed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.